

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO ANTUAN LEE,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2007

No. 268053

Washtenaw Circuit Court

LC No. 05-000709-FC

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant Mario Lee appeals as of right his jury convictions of carrying a concealed weapon,<sup>1</sup> felon in possession of a firearm,<sup>2</sup> possession of a firearm during commission of a felony,<sup>3</sup> and assault with intent to do great bodily harm less than murder.<sup>4</sup> This case arises from an altercation between Lee and Nathan Robinson during which Robinson was shot several times. We affirm.

**I. Basic Facts And Procedural History**

Samir Hanna testified that he owned Brandy's Liquor Shop in Ypsilanti and that he was working in his store on April 19, 2005. At about 11:00 p.m., Hanna called 911 because he heard shots in the parking lot. Hanna then saw Nathan Robinson, running to the store bleeding and saying that he had been shot. Hanna said that he recognized Robinson because Robinson was a regular customer at Hanna's store. Hanna said that he did not see who had fired the shots but stated that he had a security camera directed at the parking lot.

Robinson testified that he brought his bicycle into the store on the evening of April 19, 2005, purchased a soda and a bag of chips, and then left the store. Once outside the store, Lee

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<sup>1</sup> MCL 750.227.

<sup>2</sup> MCL 750.224f.

<sup>3</sup> MCL 750.227b.

<sup>4</sup> MCL 750.84.

approached Robinson, saying Robinson's name. Robinson recognized Lee from the neighborhood and did not think Lee would be friendly to him because Robinson had "got into it with" Lee's uncle about one month before the incident. Lee asked Robinson, "do you remember something that happened with my uncle" and fidgeted and scratched at his waistline "like there's something right there." Robinson dropped the bike, and when Lee was in front of him, Lee pulled out a gun from his waist and cocked it. Robinson then went for the gun, fearing he would be shot in the back if he ran, the two "tussle[ed]" for the weapon, Lee shot Robinson twice in the left thigh, and Robinson fell and stood back up. The two started "tussling" again, two people who Robinson thought were probably Lee's cousins arrived and began "helping [Lee] a little bit[.]" and Lee shot Robinson in the right thigh. Robinson fell to his knees, and Lee put the gun to Robinson's head. Robinson moved and Lee fired, missing Robinson. Lee and two other persons kicked and punched Robinson while he was on the ground, and then all three left in a car. Robinson went into the store, asked them to call the police, and was treated at a hospital. The security tape of the parking lot was played for the jury. Robinson identified Lee as the person approaching him in the video who pulled a gun out. Robinson agreed that no one had bribed him or threatened him to not testify.

Lee testified that on April 19, 2005 around 11:00 p.m., he, his friend Willie Walker, and his cousin James Kearney, went to Brandy's Liquor Shop to buy some beer. During his testimony, the security video footage was played for the jury. Lee identified himself as the person getting out of the front passenger of his cousin's car. While Lee was talking to some people outside the store, he noticed someone ride a bike into the store, but he did not see who it was. Lee said that one of the women he was talking to asked him who the person was on the bike because he had been staring at Lee. However, Lee ignored her comment at that point. Lee admitted that the video then showed him smack the popcorn out of his friend Ciera's hand, but he explained that he was "horse playing," and that he gave her a dollar afterward to buy another bag of popcorn.

Lee said that he was about to get back into his cousin's car when he recognized Robinson coming out of the store. Lee stated that he wanted to talk to Robinson about an incident two months prior in which Lee's uncle was beaten and shot; Lee believed that Robinson and his cousins had something to do with it. So Lee said "hey" to get Robinson's attention, at which point Robinson dropped his bike and turned around. Lee stated that he then walked toward Robinson, "pulling up my pants, because he threatened me like, you must want me to do like I did your uncle." But Lee said that before he could get close, Robinson "rushed" him. Lee described the altercation as the video played for the jury:

See, soon as I get right here, soon as I step, I'm still in stride. Soon as I turn like this, he come right at me and I'm doing like that. Both my hands go up in the air just like this. And, if you could see, stop right here, at the top corner here. If you watch this, you can see I'm punching (indiscernible) and you can see when we go down right here, you can see my right arm and you can see me punching like this. (indiscernible) thrust. See my right arm go up.

Lee identified two other people who came to help him as Walker and Kearney. He explained that as they were struggling, he heard a gun shot; as he was trying to process where the gun shot had come from, he heard two more gunshots, and then felt Robinson trying to pull him down. After Kearney knocked Robinson off Lee, he and Walker got into the vehicle, but Robinson was

still going after Kearney. According to Lee, Kearney threw Robinson into the street, and then the three of them drove off. Lee denied having a gun or shooting Robinson, and claimed that Walker shot Robinson, stating,

[T]he reason you can't see no gun fight on the screen, is because [Walker] had on a . . . sweatshirt with a hood . . . was pockets in it . . . . He had the gun. He said after . . . me and [Robinson] fell on the ground, he picked the gun up out the middle of the streets and put it in his pockets so no one would see it and he said he fired the gun from inside his pocket.

We will include further facts as necessary to analysis of each argument presented.

## II. Officer Szymankiewicz's testimony

### A. Standard Of Review

Lee argues that he was denied a fair trial because of the admission of Officer Dennis Szymankiewicz's testimony regarding the store's security videotape footage of the incident. Because this issue was not preserved below, we will not reverse absent plain error that affected Lee's substantial rights.<sup>5</sup>

### B. Relevant Facts

Ypsilanti Police Officer Dennis Szymankiewicz testified that he interviewed Robinson regarding the shooting. Robinson told him that Lee pulled a pistol from his waistband, Robinson went for the gun, Lee shot him, and then some other guys beat him up. The security video was then played for the jury. Officer Szymankiewicz first pointed out that the video depicted "the first aggressive behavior with [Lee] and a lady coming out of the store, minding her own business it looks like, and she's pushed and the popcorn smacked out of her . . . hand." While describing the altercation between Lee and Robinson, Officer Szymankiewicz explained that the video showed Lee "grabbing something from his waistband" and then Robinson "going after that hand that ha[d] something in" it. When asked why "this portion of the video was significant in [his] investigation of this case[.]" Officer Szymankiewicz replied, "Because it shows what [Robinson] told me in the interview . . . about what occurred." Defense counsel then asked Officer Szymankiewicz, "Would you show me precisely where you allege there is a gun in Mario Lee's hand?," to which Officer Szymankiewicz replied, "Right there."

### C. Analysis

Lee argues that Officer Szymankiewicz improperly testified that Robinson was telling the truth when he stated that the video showed "what [Robinson] told me in the interview . . . about what occurred." "It is generally improper for a witness to comment or provide an opinion on the

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<sup>5</sup> *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 761, 764-767; 597 NW2d 130 (1999); *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

credibility of another witness, since matters of credibility are to be determined by the trier of fact.”<sup>6</sup> However, Officer Szymankiewicz was not commenting on Robinson’s veracity or on Lee’s guilt. Rather, the officer merely indicated that the images on the security video were important to his investigation because they corroborated Robinson’s investigation statements.

Lee argues that Officer Szymankiewicz improperly offered an expert opinion regarding the videotape footage. However, MRE 701 provides that lay witnesses may offer testimony in the form of opinions and inferences as long as the opinions and inferences are “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” Lee cannot demonstrate on appeal that the officer’s conclusion was not rationally based on his perceptions because Officer Szymankiewicz testified that he had watched the video while investigating the crime.

Lee further argues that Officer Szymankiewicz usurped the roles of the judge and jury by deciding key questions of fact and law. More specifically, Lee argues that Officer Szymankiewicz improperly testified that Lee had a gun, when in fact it was impossible to tell from the video whether Lee actually had a gun and in light of Lee’s denial of having a gun. However, the trial court instructed the jurors that it was their duty to determine the facts of the case, that they could accept or reject anything a witness said, and that the testimony of police officers was to be judged by the same standards as other witnesses. Because “jurors are presumed to follow their instructions,”<sup>7</sup> the officer’s testimony did not usurp the role of the judge or jury. Moreover, the jury watched the video repeatedly and was in the best position to evaluate Officer Szymankiewicz’s interpretation of the events as they transpired, decipher the video for themselves, and then assess the weight of his testimony.<sup>8</sup>

In sum, we conclude that none of the alleged errors in the officer’s testimony of which Lee complains constituted plain error and, thus did not deny him his right to a fair trial.

### III. Prosecutorial Misconduct

#### A. Standard Of Review

Lee raises several claims of prosecutorial misconduct, which, because they were not raised below, we will review for plain error.<sup>9</sup>

#### B. Analysis

During direct examination, the following exchange transpired between Lee and defense counsel:

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<sup>6</sup> *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987).

<sup>7</sup> *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

<sup>8</sup> *People v Drohan*, 264 Mich App 77, 88; 689 NW2d 750 (2004).

<sup>9</sup> *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Q. You were subsequently arrested, is that correct?

A. Yes, sir.

Q. And, you were asked to make a statement, correct?

A. Yes, sir.

Q. You declined to make a statement at that time?

A. Yes, I did. I—I learned [to] talk to my lawyer first before I make any kind of statements to law officials, to have my attorney present.

Q. You've had some difficulty finding a lawyer in this case, have you not?

A. Exactly.

Q. Okay.

A. Yes, sir.

Q. And, one of the purposes of the calls to your family was to try to basically find funds for . . . a lawyer?

A. Yes, sir.

Q. Am I a retained attorney?

A. No, sir.

Immediately thereafter, on cross-examination, the prosecutor asked Lee how many attorneys he had in the case before trial defense counsel, and Lee answered that he had two prior attorneys. The following exchange then transpired between Lee and the prosecutor:

Q. And, why aren't they your attorneys any more?

A. Because they weren't trying to help me. [The first attorney], she refused to give me my police report. She didn't come—she came to see me one time and after that she didn't come to see me. Then I requested to review the videotape before my preliminary exam date and she—she kept on denying me that and I finally talked to her. We got an understanding. She say she gonna let me view the videotape, but it's gonna be after my preliminary. So, I end up seeing the videotape after my preliminary and that—that denied me, basically, the necessity I need for preliminary trial purposes . . . .

Q. Isn't it true that you also threatened [the first attorney]? Physically?

A. No, I did not.

Q. Oh, you did not? You didn't threaten her?

A. No, I did not.

Q. So, that wasn't why she asked to withdraw from you [sic] case, because you had physically threatened her?

A. She asked to withdraw from my case, because she said it was a breakdown in the case. Me and her didn't see eye to eye and we spent a lot of time arguing.

Q. Well, what about [the second attorney]? Didn't he ask to withdraw from your case because you also physically threatened him?

A. Yes, ma'am. [The second attorney], on the day of my trial, . . . me and [the second attorney] didn't see eye to eye either . . . .

Q. And you physically threatened [the second attorney] as well, didn't you?

A. —no I did not. We had arguments. And, he agreed on . . . my . . . trial date, . . . he asked me, you want me off your case today? I said, yeah.

Q. But you never threatened him or . . . never made any reference to kidnapping his children or anything like that?

A. No. I—I threatened him probably before, but I ain't never say nothing about kidnapping his kids. I agreed—he made that up and I agreed to it, to get him off my case.

Q. Oh, okay. So he lied in Court . . . ?

A. He said that, yes, ma'am.

Q. And, you agreed to that lie, so that you could get him removed from your case?

A. Yes, ma'am.

During closing argument, the prosecutor again referred to Lee's alleged threats to his attorneys: "[H]e admits that he threatened one of his attorneys on the—when he was on the stand. He admits he threatened [his second attorney.]"

Lee argues that the prosecutor committed misconduct when she asked him whether he had physically threatened his two previous attorneys in the case and when she commented on it again during closing argument. More specifically, Lee argues that the prosecutor's comments

were highly prejudicial and irrelevant, and contends that his defense counsel did not open the door to the questioning simply by asking him whether he had difficulty finding an attorney.

The propriety of a prosecutor's remarks depends on all the facts of the case.<sup>10</sup> Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.<sup>11</sup> A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused.<sup>12</sup> However, otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel.<sup>13</sup> In determining whether an invited response merits reversal, a court should consider the conduct that prompted the prosecutorial response and the proportionality of that response.<sup>14</sup>

The implication left by Lee's exchange with his defense counsel was that he had difficulty finding a lawyer, due in part to financial issues. On cross-examination, he explained that there was simply a breakdown in the relationship with his first two attorneys. At that point, the prosecution attempted to impeach Lee's testimony by specifically questioning him regarding the alleged threats. Therefore, the prosecutor's questions were an invited response to Lee's testimony regarding the circumstances of his first two attorneys' withdrawals. Moreover, even assuming the prosecutor's questions and comments were improper, their introduction does not require reversal because the potential prejudicial effect could have been cured by a timely instruction to the jury to ignore the evidence.<sup>15</sup> Further, given the weight of the evidence adduced at trial—including Robinson's identification of Lee as the shooter—reversal for this harmless error is unwarranted.<sup>16</sup>

We also reject Lee's argument that the prosecutor committed misconduct by asking Officer Szymankiewicz what Robinson told him during his initial contact at the store. During direct examination, the prosecutor asked Officer Szymankiewicz whether Robinson had initially described what happened. Officer Szymankiewicz confirmed that he had, and then explained as follows:

He said he came . . . out of the store and he was approached after Mario Lee, the Defendant, yelled his name and he said that he pulled out a pistol from his waistband. He said that he went to grab it, because they were so close. He didn't want to run and get shot in the back and they had a tussle, trying for the gun and he got shot and he shot him again and then some guys beat him up.

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<sup>10</sup> *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

<sup>11</sup> *Id.*

<sup>12</sup> *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007).

<sup>13</sup> *Id.* at 64.

<sup>14</sup> *Jones, supra* at 353.

<sup>15</sup> *Dobak, supra* at 67, 68.

<sup>16</sup> *Id.* at 67.

Lee argues that this was inadmissible hearsay evidence offered to bolster Robinson's credibility. However, the officer testified that Robinson made the statement while the officer was applying pressure to one of Robinson's wounds and while the officer was trying to get Robinson to talk because Robinson was bleeding and appeared to be in shock. "MRE 803(2) provides an exception to the hearsay rule for a 'statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'"<sup>17</sup> The evidence reflects that the statement was made while Robinson was under the stress of a startling event, and thus constituted an excited utterance. Therefore, we find no error in the introduction of this testimony under this well-established exception to the general hearsay rule.

Lee next argues that the prosecutor committed prosecutorial misconduct when she asked him whether he told the officers at the time of his arrest that Walker was the shooter. At trial, Lee testified on direct examination that Walker had shot Robinson. On cross-examination, Lee explained that, other than mentioning it to his "lawyer," he had never before identified Walker as the shooter. More specifically, Lee argues that the prosecutor violated his Fifth Amendment<sup>18</sup> right to remain silent by asking him whether he told police that Walker was the shooter after his arrest. A prosecutor may not comment on a defendant's silence when accused by police, but a prosecutor may comment on the defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true.<sup>19</sup> Here, if Lee's version of the events—that Walker shot Robinson—was true, then it would have been natural for him to report that when he was being placed under arrest for the crime. Accordingly, Lee has failed to show that the prosecutor's question constituted plain error affecting his substantial rights.

#### IV. Amendment Of Information

##### A. Standard Of Review

Lee argues that the trial court erred in allowing the prosecution to amend the information to add, as an additional basis for the felon in possession of a firearm charge, Lee's prior conviction of resisting and obstructing a police officer, and thereby allowing evidence of that prior conviction to be admitted at trial. A trial court's admission of evidence and decision to amend an information are both reviewed for an abuse of discretion.<sup>20</sup>

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<sup>17</sup> *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003).

<sup>18</sup> US Const, Am V; *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>19</sup> *People v McGhee*, 268 Mich App 600, 634-635; 790 NW2d 595 (2005); *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

<sup>20</sup> *People v Hackett*, 421 Mich 338, 365; 365 NW2d 120 (1984); *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005).

## B. Analysis

Lee did not offer to stipulate that he had a felony conviction that disqualified him from possessing a firearm. Accordingly, it was not an abuse of discretion for the trial court to conclude that the prosecution should not have been precluded from relying on the resisting and obstructing conviction as a basis for the felon in possession of a firearm charge, where Lee had not agreed to refrain from challenging the fact that he had been convicted of receiving stolen property. In this regard, we note that while Lee characterizes the resisting and obstructing conviction as an assaultive conviction similar to the assaultive charges in this case, a jury could well have considered the resisting and obstructing conviction to have been based on much more passive noncooperation than the highly violent conduct charged in this case.

## V. Effective Assistance Of Counsel

### A. Standard Of Review

Lee raises several claims of ineffective assistance of counsel, which we will review de novo for errors apparent on the record.<sup>21</sup> To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that but for counsel's ineffective assistance, the result of the proceeding would have been different.<sup>22</sup> "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy."<sup>23</sup>

### B. Analysis

Lee argues that he was denied the effective assistance of counsel when defense counsel failed to object to Officer Szymankiewicz's testimony regarding the video footage. However, because Lee's arguments regarding error in the admission of the officer's testimony lack merit, Lee cannot show that he was denied the effective assistance of counsel. Defense counsel is not required to advocate a meritless position.<sup>24</sup>

Lee also argues that he was denied effective assistance of counsel because of defense counsel's failure to object to the questioning about why his previous attorneys no longer represented him. Even assuming arguendo that defense counsel's failure to object violated an objective standard of professional reasonableness,<sup>25</sup> given the admissible evidence supporting

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<sup>21</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973); *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

<sup>22</sup> *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

<sup>23</sup> *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

<sup>24</sup> *Rodgers*, *supra* at 715.

<sup>25</sup> *Id.* at 714.

Lee's conviction, there is no reasonable probability that the jury convicted Lee based on evidence that he threatened his previous attorneys rather than based on the admissible evidence.<sup>26</sup>

Lee next argues that defense counsel was constitutionally ineffective for failing to object to the alleged hearsay statement introduced by Officer Szymankiewicz. The statement was admissible as an excited utterance, and defense counsel cannot be faulted for failing to raise a futile hearsay objection.<sup>27</sup>

Lee also argues that trial counsel provided ineffective assistance of counsel in failing to stipulate that Lee was a felon ineligible to possess a firearm under the felon in possession of a firearm statute. We disagree. One requirement for establishing a claim of ineffective assistance of counsel is showing a reasonable probability of a different outcome absent counsel's alleged deficient performance.<sup>28</sup> Given the overwhelming evidence of Lee's guilt adduced below, there is no reasonable probability that an offer by trial counsel to enter into a stipulation regarding the felon in possession of a firearm charge would have changed the outcome of the trial.

Lee next argues that defense counsel denied him the effective assistance of counsel by opening the door to testimony concerning why Lee declined to make a statement to the police by asking Lee if he had an opportunity to make a statement to the police and why he did not make a statement. However, in light of the evidence adduced, there is no reasonable probability that the result would have been different had defense counsel not asked these questions,<sup>29</sup> because the jury watched the security video of the scene, heard eyewitness testimony from Robinson, and heard testimony that Lee attempted to bribe Robinson to not testify. Thus, Lee has not established this ineffective assistance of counsel claim.

## VI. The Recorded Telephone Calls

Lee argues that he was denied a fair trial by introduction of recorded telephone calls that he made from jail asking friends and family members to offer Robinson a car and money to not show up at the preliminary examination. Lee points out that Robinson testified that he never was actually bribed. Therefore, Lee argues, the telephone conversations were prejudicial and irrelevant to the issue of whether he shot Robinson. Lee also argues that the recording of the calls violated his reasonable expectation of privacy.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>30</sup> The tapes were relevant because they had a tendency, to make the existence of a fact of consequence more probable than it would be without the

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<sup>26</sup> *Id.*

<sup>27</sup> *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

<sup>28</sup> See *Rodgers*, *supra* at 714.

<sup>29</sup> *Id.*

<sup>30</sup> MRE 401.

evidence; namely, the attempt to suppress evidence was evidence of Lee's guilty state of mind.<sup>31</sup> In other words, the jury was ultimately required to conclude whether Lee had shot Robinson. In reaching this conclusion, the jury could conclude that the attempt to suppress evidence heard on the audio recordings was evidence of Lee's guilty state of mind, and thus evidence that he had indeed shot Robinson.

With respect to Lee's claim of violation of his privacy, this Court held in *People v DeGeer*, that recording an inmate's outgoing calls did not violate the inmate's constitutional or statutory rights or his reasonable expectation of privacy, when the inmate had reasonable notice that his outgoing calls could be recorded.<sup>32</sup> The recordings here began with a recorded statement that the "call was subject to monitoring or recording." Further, when asked why he did not tell his mother that another person was the shooter when she suggested he claim he was on drugs during the shooting, Lee testified that he "knew this tape was recording." Thus, the evidence reflects, and Lee admits, that he had notice that his outgoing calls could be and in fact were being recorded.

Lee argues that the prosecutor did not lay a proper foundation to admit the audio recordings because Robinson testified that no one bribed him. However, "Michigan authority [holds] that actions by the defendant such as . . . procuring perjured testimony and attempts to destroy evidence, while possibly as consistent with innocence as with guilt, may be considered by the jury as evidence of guilt."<sup>33</sup> Moreover, as noted in *People v Ranes*:

"It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's . . . suppression of evidence by bribery . . . is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit."<sup>34]</sup>

Because Lee's requests that others bribe Robinson to not show up could be interpreted as an attempt to suppress evidence, the trial court did not abuse its discretion in admitting the evidence. It cannot be reasonably argued the tapes are less probative because no one actually bribed Robinson as Lee had requested. In other words, what is relevant is not the effects of Lee's requests but the requests themselves, which could be indicative of Lee's consciousness of guilt.

Lee argues that the recordings should not have been admitted because his offers of a car and money could just as likely have been intended to get Robinson to tell the truth and drop the charges. Again, even assuming that Lee's bribery attempt was somehow consistent with

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<sup>31</sup> *People v Ranes*, 58 Mich App 268, 272; 227 NW2d 312 (1975).

<sup>32</sup> *People v DeGeer*, 140 Mich App 46, 47-48; 363 NW2d 37 (1985).

<sup>33</sup> *People v Casper*, 25 Mich App 1, 7; 180 NW2d 906 (1970).

<sup>34</sup> *Ranes*, *supra* at 272, quoting *People v Hooper*, 50 Mich App 186, 199; 212 NW2d 786 (1973), quoting 2 Wigmore, Evidence (3d ed), § 278, p 120.

innocence, attempts to suppress evidence, “while possibly as consistent with innocence as with guilt, may be considered by the jury as evidence of guilt.”<sup>35</sup>

## VII. Evidence Of Flight

Lee argues that the mere fact that he left the scene of the shooting was not sufficient to constitute evidence of flight. Flight specifically “includes such actions as fleeing the scene of the crime.”<sup>36</sup> It is undisputed that Lee left the scene immediately after the shooting and before the police arrived. This Court has held that the prosecutor is entitled to comment on the evidence of flight and the inferences that can be drawn therefrom.<sup>37</sup> Therefore, we conclude that Lee suffered no prejudice from admission of this evidence.

Lee argues that the evidence regarding his fleeing the scene was irrelevant because the only “fact . . . of consequence” was whether Lee shot Robinson. Ultimately, the jury was required to conclude whether Lee had shot Robinson. But in reaching its conclusion regarding whether Lee shot Robinson, the jury could conclude that Lee’s flight was evidence of Lee’s guilty state of mind, and thus draw the inference that he had indeed shot Robinson. Thus, the flight evidence was relevant.<sup>38</sup>

## VIII. Cumulative Error

Lee argues that the cumulative effect of multiple errors denied him a fair trial. In determining whether a criminal conviction should be reversed because of the effect of cumulative errors, “only actual errors are aggregated to determine their cumulative effect.”<sup>39</sup> Because we find no actual errors here, Lee’s argument is without merit.

Affirmed.

/s/ William C. Whitbeck

/s/ Michael J. Talbot

/s/ Brian K. Zahra

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<sup>35</sup> *Casper, supra* at 7.

<sup>36</sup> *Goodin, supra* at 432.

<sup>37</sup> *Id.* at 432-433.

<sup>38</sup> See MRE 401.

<sup>39</sup> *LeBlanc, supra* at 592.